

IX
LAW

Islam and Law

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Unlike other system of law, the law of Islam has its source in divine revelation. It is the Muslim's belief that Allah has from time to time sent His prophets and messengers to teach mankind the correct way of life so as to achieve success and felicity in this world and the next. Muslims also believe that the Prophet Muḥammad (SAAS) was the last of these prophets and, therefore, the teachings of Islam constitute the complete and perfect code of conduct for humans. Legislation in Islam is to be found in the teachings revealed to the Prophet Muḥammad (SAAS) and contained in the Qur'an. The source of this legislation is Allāh (SWT). As there can be no further revelation after the Prophet Muḥammad (SAAS), it follows that the laws contained in the Qur'an are final, valid for all times and places, and that no human hand can amend or reform them.

In addition to the legislation contained in the Qur'an, we find that the method of interpretation and application of the legislation has also been provided for! Whereas modern legislation has to be interpreted by courts, interpretation of Qur'anic legislation has been provided by the *Sunnah*, that is, the inspired teaching and practice of the Prophet Muḥammad (SAAS). Again, by Qur'anic authority, the Prophet was not only the transmitter of the divine revelation but also exemplified it in his words, attitudes, judgements and actions.

We read in the Qur'an the following verse:

You have indeed in the Messenger of Allah a beautiful pattern of conduct for anyone whose hope is in Allah and the Final Day and who engages much in the praise of Allah²

Nor does he [the Prophet] say aught of his own desire. It is no less than inspiration sent down to him.³

The example of the Prophet as contained in the *Sunnah* and recorded in the *Ḥadīth* therefore forms a source of Islamic law, as in effect a supplement to the Qur'an. The acts, the sayings and even the silence of the Prophet

(SAAS) have become a source of guidance for Muslims, of what they regard as the data of revelation. In all matters that have been dealt with and explained by him, all Muslims are bound to accept his ruling. Since there can be no higher source of guidance, it follows that the rulings of the *Sunnah* cannot be overturned by any human being.

The Qur'an does not however contain a code of laws. Except in a few matters, the guidance given in the Qur'an is in the form of general principles rather than detailed prescriptions. The Prophet (SAAS) was also careful not to bind the Muslims with too much detail. His approach was practical. Whenever he was asked to give a ruling on a particular matter, the Prophet (SAAS) would ask if the matter had already occurred, and he discouraged his companions from raising hypothetical questions by which they would find themselves later bound.⁴ Moreover, he was careful to distinguish in his rulings between those instructions that he gave as the Messenger of Allah, and hence as divine revelation, and those that he gave on his own authority. He, and the Muslims after him, regarded only the former as binding. The Muslims treated the latter with utmost respect,⁵ and in most cases worthy of emulation, but they continued to keep the distinction between the divine and the human in the *Sunnah*. Thus, while the Qur'an is a complete guide for everything⁶, much was left to the reasoning, or *ijtihad*, of the Muslims. When Mu'adh ibn Jabal was sent as the Prophet's delegate to Yemen, he was asked how he would decide matters referred to him. His reply was, "According to the Qur'an." The Prophet (SAAS) then asked him "What if you do not find a definite ruling in the Qur'an?" Mu'adh replied, "I will look into the *Sunnah* of the Prophet." Once again the Prophet (SAAS) asked, "What if you do not get a definite ruling therefrom?" Mu'adh replied, "I will then use my reasoning to arrive at a solution." The Prophet (SAAS) was pleased with this answer and gave praise to Allah for giving him such a worthy delegate.⁷

To those who argue that because the Qur'an and the *Sunnah* are fundamental and cannot be amended or changed there is little scope for the intellect in formulation of Islamic law, one has only to point to the vast library of Islamic jurisprudence, the result of the efforts of Muslim jurists in using their reason and powers of intellection to arrive at solutions to problems not specifically dealt with in the Qur'an and the *Sunnah*, and to expand upon and extrapolate from the *data revelata* either to cover new cases or to realize greater equity under the challenging circumstances of history. And yet, throughout Islamic history, the divine and the human elements in legislation were never mixed. The vast difference between the inspired sources of Islamic law—the Holy Qur'an and the *Sunnah*—and the non-inspired sources—the result of *ijtihad* by Muslim scholars has never been far from sight. Imam Shafi'i explained this by using the analogy of a Muslim seeking to face the Ka'bah when he wished to perform his *Ṣalah*. If the person is in Makkah al Mukarramah and

in the presence of the Ka'bah itself, he can have no choice but to turn toward it. In such situation, there is no room for the use of the intellect. The sight of the Ka'bah experienced by him obliges him to perform his ritual facing it. The experience, which is instantly verifiable, precludes any argument about it. On the other hand, if the Muslim is far away from the Ka'bah and cannot see it with his own eyes, then he must use his reasoning to find out in which direction he should turn to face the Ka'bah. The solution he arrives at is the result of *ijtihad*. It cannot have the certainty of the person seeing the Ka'bah with his own eyes, and it may be right or wrong.⁸ But the Muslim gets a blessing for using his intellect to the best of his ability.⁹ This then is the way of the Muslim scholar who uses his intellect.

Development of Islamic Law

It might be useful to have a quick glance at the history of the development of Islamic law. In the lifetime of the Prophet (SAAS), the law could be enacted and amended by divine revelation and any disputes or problems that could be referred to him for solution. After his demise, the law could not be developed further through divine inspiration since the medium of Divine communication was no more. If any problems, arose the Muslims had to solve them by reference to the Qur'an or the *Sunnah*. It was the practice of the early caliphs to try to arrive at solutions through discussion and consensus among those best fitted to do so. Practical problems received their practical solutions. The caliph in power took an active role in the deliberations. When once a solution was arrived at, it became binding on other Muslims. The early caliphs never tried to dictate or impose their wills. In many cases the caliphs were told that the solutions they proposed were contrary to the teachings of Islam, and they accepted the criticism and withdrew their suggestions. The solutions were therefore the best the Muslims could agree upon at under the circumstances. The practice of the Muslims thus conformed to the teachings of Islam.

After the time of the early caliphs, there came a time when the development of Islamic law came to be divorced from its practice. The Ummawi caliphs, for the most part, left the administration of Islamic law to the state officials, the *qādis*, not all of whom were qualified to exercise the duty of *ijtihad*. The result was that the law that was administered by the *qādis* ceased to draw its inspiration from Islamic law. Practice diverged from theory, and it became dangerous to rely on the practice of the Muslims as a mirror of the conscience of Islam. The scholars of Islam criticized the administration of the law and in the process built up their own system of theoretical law.

Thus the law was developed by scholar-jurists rather than by judges or by the executives in power. This meant that Islamic law had no longer the advantage of the Muslims' experience of living and marrying, of buying and selling, and of contracting. This explains why the student of Islamic law or a *qāḍī* today seeks the normative injunctions of Islamic law not in the decisions of the courts or the rulings of the executive power but in the theoretical writings of scholar-jurists. There is of course a "silver lining, namely" that the efforts of the scholar-jurists have helped to preserve Islamic law and to keep it free from the influence of secular rulers and their agents, even when these were *qāḍīs*. For this we should be grateful to the scholar-jurists. They have left a vast treasure of learning as an inheritance to us. It is for us to learn how to use it.

In the thirteenth and fourteenth centuries, the Muslims came under the influence of the Europeans. Most Muslim countries lost their independence. Executive, legislative and judicial power came to be influenced or exercised by the Europeans. European codes and systems of law were substituted for Islamic law and for centuries the law of the land was exercised, by decree of the colonialist rulers. In the Arab countries, European commercial, criminal, and civil codes were adopted. In Turkey, after an attempt to codify the theoretical civil law, the whole of the Muslim law was abandoned in favor of a European code. In India, the Penal Code, Evidence Act, Contract Act and others were enacted, again to replace Muslim law. The changes spread to Malaysia, where the Indian Codes were adopted to take the place of Muslim law. In most cases, Muslim governments and people are still trying to adjust to this invasion of foreign legal systems and practices. The results, however, are still far from satisfactory.

In some Arab countries, attempts have been made to replace the European codes with codes more compatible with Islamic law. New civil codes were promulgated in Egypt, Libya, and Iraq. More recently, attempts are being made in a number of Muslim countries to reintroduce Islamic criminal law. Muslim scholars everywhere feel that they should return to Islamic law; but so far, no clear consensus has emerged among them as to the precise contents of that law. Unfortunately, their difficulties are exacerbated by a class of Westerners educated judges and executives who combine ignorance of Islamic law and jurisprudence with an inferiority complex toward Western laws and institutions to which they have become accustomed.

Early Examples

If we go back to the time of the Prophet (SAAS) and the early caliphs,

we find that decisions were given on actual cases brought before them for judgement. This practical bent of Islamic law is its strength. It keeps the law alive and dynamic, running closely in line with the spirit of Islam, animating the Muslims. But the jurists of today are pressing for systematic codifications that envisage all possible cases, real, hypothetical, or extremely speculative.

Thus we read in the *hadīth* of a number of cases in which the Prophet (ṢAAS) reached judgements based solely on the data available. A few examples are given below:

- a) Al Khansā bint Khidam al Anṣāriyyah reported that her father gave her in marriage when she was a widow and she disliked the marriage. So she went to Allah's Messenger (ṢAAS) and he declared the marriage null and void.¹⁰
- b) 'Āishah (RAA) reported: "Sa'd b. Abu Waqqās and 'Abdullah b. Zaman disputed with each other over guardianship of a minor. Sa'd said, 'O Messenger of Allah, the boy is the son of my brother 'Utbah b. Abu Waqqās. Look at his resemblance to him.' 'Abdullah b. Zaman said, 'O Messenger of Allah, he is my brother as he was born on the bed of my father from his slave girl.' Allah's Messenger (ṢAAS) looked at the boy and found in him clear resemblance to 'Utbah. But he said 'He is yours O 'Abdullah b. Zaman for the child is to be attributed to the person on whose bed it was born; and stoning is decreed for the fornicator.'"¹¹
- c) 'Āishah (RAA) reported: "The wife of Rifa'ah al Qurazi came to the Messenger of Allah and said 'I was married to Rifa'ah but he divorced me, making my divorce irrevocable. Afterwards I married 'Abd al Rahman b. Al Zubayr, but all he possesses is like the fringe of a garment.' Thereupon Allah's Messenger smiled and said, 'Do you wish to return to Rifa'ah? You cannot do it until you have tasted his sweetness and he, 'Abd Al-Rahmān, has tasted your sweetness.'"¹²
- d) Ibn 'Abbās narrated: "The wife of Thābit bin Qays came to the Messenger of Allah and said, 'O Messenger of Allah! I do not blame Thabit for any defects in his character or his religion but I dislike to behave in an un-Islamic manner (in another narration: but cannot endure to live with him).' On that Allah's messenger said to her, 'Will you give back the garden that your husband has given you?' She said, 'Yes.' Then the Prophet said to Thabit 'O Thabit! Accept the garden and divorce her.'"¹³

- e) Ibn 'Abbās narrated: "Barīrah's husband was a slave called Mughith. I imagine I can see him now, going behind Barīrah, and weeping with his tears flowing down his beard. The Prophet said to Ibn 'Abbas, 'O Ibn 'Abbās! Are you not astonished at the love of Mughith?' The Prophet then said to Barīrah, 'Why don't you return to him?' She said, 'O Messenger of Allah. Do you order me to do so?' He said 'No, I only intercede for him.' She said, 'I am not in need of him.' The Prophet let her do what she pleased."¹⁴
- f) Jābir reported that the wife of Sa'd b. Rabī came with her two daughters by Sa'd to the Messenger of Allah. She said, "O Messenger of Allah, these are the two daughters of Sa'd b. Rabī. Their father was martyred on the day of *Uḥud*, and their uncle has taken their property. Their father left no other inheritance for them and they cannot be married unless they have some property." Then the verse of inheritance was revealed. So the Prophet sent for their uncle and said, "Give the two daughters of Sa'd two thirds and give their mother one-eighth. What remains is for you."¹⁵
- g) Sa'd bin Abu Waqqās narrated: "The Prophet came visiting me while I was sick in Makkah. I said 'O Allah's Messenger. May I will all my property in charity?' He said, 'No.' I said 'Then may I will half of it?' He said, 'No.' I said, 'One-third?' He said, 'Yes, one-third, though one-third is too much. It is better for you to leave your natural heirs provided for than to leave them poor and begging from others.'" At that time Sa'd had only one daughter.¹⁶

We are told that when Abū Bakr (RAA), the first caliph, had to pass a judgement, he looked into the Qur'ān for guidance. If he found an applicable text, he would apply it forthwith. If not, he turned to the *Sunnah*. If he found an applicable text therein he would apply it with no less determination. If not, he would ask the people whether any of them knew of a judgement passed by the Prophet on the particular issue. It sometimes happened that some people would come forward and state that the Prophet had passed a judgement on an identical or similar matter. If there was nothing at all, he would summon the chief representatives of the people and consult with them. 'Umar (RAA), the second Caliph did the same, except that he used to ask whether Abū Bakr had passed judgement on the issue before him.¹⁷ There is no reason why we should not follow the rule of precedent in Islamic law. By relying on decided cases as precedents we will be keeping closer to the practical aspects of the law. It is not suggested that we should follow a strict doctrine of binding precedent as is to be found in English law. There is no need for us to

copy the English doctrine, as we have had our own principles of precedent long before English law was born.

The Qur'an and Sunnah

In a famous letter written by 'Umar (RAA), the second caliph, to a *qāḍī*, Abū Mūsā Al Ash'ari, he wrote:

Jurisdiction is to be administered on the basis of the Qur'an and *Sunnah*. First understand what is presented to you before passing any judgement. Full equality for all litigants: in the way they take place in your presence and in the way you look at them and in your jurisdiction. That way no highly placed person would look forward to your being unjust nor would a weak one despair of your fairness. The burden of proof is the responsibility of the plaintiff and the oath is upon the denying party. Compromise is always the right of litigants except if it allows what Islam has forbidden or forbids what Islam has allowed. Clear understanding of every case that is brought to you for which there is no applicable text of the Qur'an and *Sunnah* is an absolute requisite. Your role will then be one of comparison and analogy, so as to distinguish similarities and dissimilarities. Thereafter, seek your way to the judgement that seems nearest to justice and apt to be best in the eyes of Allah. Never succumb to anger or anxiety, and never get impatient with the litigants before you.¹⁸

Ideally the study of Islamic law must therefore begin with the Qur'an and the precedents established by the Prophet (SAAS). In this respect, a knowledge of Arabic is essential. As Imām Shafī'ī said:

The reason I began to explain why the Qur'an was communicated in the Arabic tongue rather than in another is that no one understands clearly the meanings of the Book of Allāh would be ignorant of the intensiveness of that tongue and of the various meanings of its words. The doubts which occur to one who is ignorant of the Arabic tongue have no hold on him who knows it.

In the same vein, Abul A'la al Mawḍūdī also stated:¹⁹

The first and basic reform is to decide that a knowledge of Arabic shall be a prerequisite for admission to law college. This

knowledge of Arabic should be such as to enable the students to study the Qur'an, the *ḥadīth* and the tradition of *fiqh* and legal thought. Insight into Islamic law cannot be gained unless one knows the language of the Qur'an and that of the Prophet (SAAS). The study and understanding of the Holy Qur'an and especially the verses dealing with the law must be the basis of the study of Islamic law. Next to the Holy Qur'an or rather together with the Holy Qur'an, we need to study the *ḥadīth* of the Prophet (SAAS) to see how the teachings of the Holy Qur'an were exemplified and applied to the Muslims.²⁰

Again to quote Mawdūdī:²¹ "Along with the teaching of Arabic, the students must be made to study the Qur'an and the *ḥadīth* before beginning their education in law so that they become capable of understanding the spirit and the broad outlines of the system of life envisaged by Islam—A student must acquire an understanding of Islam as a system through a study of the Qur'an and the *ḥadīth* before he begins the study of *fiqh*."²¹

In Malaysia, where knowledge of Arabic among staff and students is neither widespread nor deep, it is necessary to resort to translations and interpretations of the Qur'an and the *ḥadīth* in English or Malay. Fortunately, a number of these are available and may be referred to with confidence. Similarly we have the translations of *Ṣaḥīḥ Muslim*, the *Sunan of Abū Dāwūd*, the *Muwattā' of Imām Mālik* and *Mishkāt al Masābiḥ*. These can be utilized in the study of the Qur'an and the *ḥadīth*. In addition, selected passages—especially those dealing with the law—can be referred to in the original and explained to students.

While there is now a fairly common and accepted method of referring to the verses of the Qur'an, by *surah* and *āyah*, there is as yet no such method used for referring to the *ḥadīth*. Often we find that when a *ḥadīth* is cited, the reference given is to Bukhāri, Muslim, or Abū Dāwūd, for example, without volume or page reference. Hence it is difficult for the reader or listener to check the reference. We need therefore to work out an accepted system of reference.

Apart from the Qur'an and the *ḥadīth*, we have need to refer to the *fiqh* textbooks, as in these books we find the best material for legal precedents and their explanations. Here again until we reach the ideal situation where the student can refer to and understand the original texts in Arabic, we need to have translations of the more important textbooks, and those generally in use. Not only is there a need to translate such textbooks but they need to be edited and indexed. It may be necessary too, as Mawdūdī suggested, for us to rearrange the contents of the textbooks on the pattern of modern textbooks of law. New headings will have to be given, scattered discussions on legal

problems will have to be gathered and collected under relevant headings and indices will have to be prepared.²²

In many Muslim countries, secular systems of law have invaded the juristic life of the people and it is necessary for anyone who wants to practice law in these lands, even if his practice were to be restricted to the *Shari'ah*, know the system of law in force. Thus in Malaysia to be a practitioner in the courts one needs to be proficient in Malaysian law, which is based on English common law and statute law, as well as Islamic law. A comparative approach must be adopted so that the study of the *Shari'ah* is integrated with the study of the local law in force. Thus the branches of the law like the law of contracts and torts, family law, criminal law, company law, the land law, and constitutional law, to name a few examples should be studied in both the *Shari'ah* and in the local law.

To conclude we might quote from the recommendations of the First World Conference on Muslim Education, 1977, which appear to be relevant—:

Education should aim at the balanced growth of the total personality of Man both individually and collectively, through the training of Man's spirit, intellect, the rational self, feelings and bodily senses. Education should, therefore, cater to the growth of man in all its aspects—spiritual, intellectual, imaginative, physical, scientific, linguistic—and motivate all these aspects towards goodness and attainment of perfection. The ultimate aim of Muslim education is in the realization of complete submission to Allah on the level of the individual, the community, and humanity at large.²³

The Conference recommended that all Muslim countries necessarily implement Allah's *Shari'ah* and mould the lives of their peoples upon Islamic principles and values, because only then can they succeed in systematizing their educations according to the aims given above. There must be a core knowledge drawn from the Qur'an and *Sunnah* which must be made obligatory to all Muslims at all levels of the educational system, from the highest to the lowest. It should be graduated so as to conform to the standards of each level. This, along with the compulsory teaching of Arabic, should form the major section of the core curriculum. These two alone can sustain Islamic civilization and preserve the identity of the Muslims.

The study of *fiqh* (Islamic law) and of *uṣūl al fiqh* (Islamic jurisprudence) should be linked with and bear on our contemporary lives, as they are actually lived and experienced, and their problems and issues, with particular emphasis on Islamic solutions as they must be applied in an integrated form in Muslim society. The study of the *Shari'ah* with all its related branches should form the core course in faculties of law together with comparative studies between *Shari'ah* and secular laws in the advanced stages of study. Such courses

should be given by a panel of specialists who, in virtue of their deep faith, commitment, and scholarship, are competent to elucidate the integral, comprehensive, and sublime character of the *Sharī'ah* as an effective instrument in serving the interests of the people, meeting the needs of the community, and avoiding the pitfalls arising from the application of secular laws as have been recognized by contemporary capitalist and communist societies alike.

NOTES

- 1 Qur'an 75:19.
- 2 Ibid, 33:21.
- 3 Qur'an 53:3-5.
- 4 Sa'id Ramaḍān, Islamic Law, p. 66.
- 5 Ibid., Islamic Law, p. 76-77.
- 6 Qur'an 16:89.
- 7 Sa'id Ramaḍān, Islamic Law, p. 74.
- 8 Ibid., p. 82f; Shafi'ī's Risālah, p. 290f; p. 295f.
- 9 Shafi'īs Risālah, p. 299 quoting Muslim vol. xii p. 13-14 and Abū Dāwūd vol. iii, p. 299.
- 10 Ṣaḥīḥ al Bukhārī, "Kitāb al Nikāḥ" (52) Ḥadīth 69; vol. 7, p. 52.
- 11 Ṣaḥīḥ Muslim, "Kitāb al Nikāḥ" (8) Ḥadīth 3435; vol. 21, p. 744.
- 12 Ṣaḥīḥ Muslim, "Kitāb al Nikāḥ" (8) Ḥadī 3345; vol. 2, p. 729.
- 13 Ṣaḥīḥ al Bukhārī, "Kitāb al Ṭalāq" (63); Ḥadīth 177; vol. 7, p. 150.
- 14 Ṣaḥīḥ al Bukhārī, "Kitāb al Ṭalāq" (63) Ḥadīth 154; vol. 7, p. 154.
- 15 Mishkāt al Maṣābīḥ, vol. 2, p. 334, Ḥadīth 54.
- 16 Ṣaḥīḥ al Bukhārī, "Kitāb al Waṣayā" (51) Ḥadīth 5; vol. 4, p. 3.
- 17 Sa'id Ramaḍān, Islamic Law, p. 34-35.
- 18 Ibid., p. 35.
- 19 Shafi'ī's Risālah, p. 63-64.
- 20 Maudūdī, Abul A'lā, Islamic Law and Constitution, p. 110.
- 21 Ibid., p. 110.
- 22 Ibid., p. 107.
- 23 "Recommendations of the Fourth World Conference on Islamic Education," Makkah al Mukarramah, 1403/1983, p. 16-18.